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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of)
)
)

WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)
)

COMMENTS OF THE CITY OF PLYMOUTH, MINNESOTA

These Comments are filed by the City of Plymouth, Minnesota to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. Plymouth, Minnesota also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling

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in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in the City of Plymouth, Minnesota.

1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings, others are required by state and local law to follow certain processes and procedures.

State and local laws in Plymouth, Minnesota require certain notice and public hearings to ensure that the rights of the applicant and the public are preserved. These requirements are found in the following state and local code provisions: Minnesota State Statute 15.99 and Plymouth City Code Sections 21015.02 and 21025.02. Specifically, the City of Plymouth, Minnesota is required to process any application within sixty (60) days from the date of its official and complete submission unless extended pursuant to Statute or a time waiver is granted by the applicant. Pursuant to Minnesota Statute 15.99, the City

staff is authorized to extend the sixty (60)-day time limit by a time period not to exceed sixty (60) additional days, provided written notice of the extension is provided to the applicant before the end of the initial sixty (60)-day period.

The City of Plymouth, Minnesota has a specific ordinance addressing wireless facility siting. The ordinance was enacted April 2, 1997, after a unanimous vote by the five Councilmembers present. This ordinance allows for administrative review of collocation applications and new towers installed in industrial districts. Conditional use permits (CUPs) are required for all towers proposed in residential, institutional, and commercial districts. CUPs are reviewed by the City Council after a public hearing is held at the Planning Commission. Notice of the public hearings must be published in the City's official newspaper at least ten (10) days in advance of the public hearing at the Planning Commission. As the City's official newspaper is a weekly, the City must request publication of the notice twenty-one (21) days in advance of the public hearing.

2. NUMBER OF APPLICATIONS AND OUTCOMES

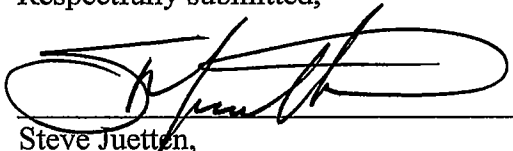
In the last five years (2003-September of 2008), the City of Plymouth has had twenty-two (22) applications for approval of wireless telecommunications facilities. Of these, fifteen (15) applications were for collocations on existing facilities, like water towers, light poles or buildings, and seven (7) were for new towers.

In Plymouth, Minnesota, the average time between filing of an application and final decision was sixty (60) days for the seven (7) applications for new towers and twenty-nine (29) days for collocations. By comparison, the average time between application and final action for other land use approvals, like CUPs, is sixty-to ninety (60-90) days.

3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,


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